(20) (13) (14)

Supreme Court, U.S.
FILED
NOV - 9 2001
OFFICE OF THE CLERK

Nos. 00-1751, 00-1777 & 00-1779

IN THE

Supreme Court of the United States

SUSAN TAVE ZELMAN,
SUPT. OF PUB. INSTR. OF OHIO, ET AL.,
Petitioners,

v.

DORIS SIMMONS-HARRIS, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF BLACK ALLIANCE FOR EDUCATIONAL OPTIONS AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

SAMUEL ESTREICHER
(*Counsel of Record*)
ERIKA R. FRICK
O'MELVENY & MYERS LLP
Citigroup Center
153 E. 53rd Street
New York, NY 10022
(212) 326-2000

Counsel for Amicus Curiae

40 pp

QUESTION PRESENTED

Whether a facially neutral program offering economically disadvantaged inner-city children a viable alternative to a failing public school system – through scholarships that those children may use at participating secular or religious private schools or suburban public schools – creates an establishment of religion because most of the schools that have registered for the program during its early stages are religiously affiliated.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

INTEREST OF AMICUS 2

INTRODUCTION AND SUMMARY OF ARGUMENT 2

ARGUMENT 6

I. THE OHIO PILOT SCHOLARSHIP PROGRAM DOES NOT HAVE THE PRIMARY EFFECT OF ADVANCING RELIGION UNDER THIS COURT'S CURRENT UNDERSTANDING OF THE EFFECTS TEST. 6

A. The Pilot Program Determines Eligibility for Benefits in a Neutral, Evenhanded Fashion Without Regard to Either the Religious Affiliation of the Participating Schools or the Religious Identity of the Families Who Use the Vouchers 8

B. The Pilot Program Does Not Result in Religious Indoctrination Attributable to the Government Because It Is a "Private Choice" Program in Which the Genuinely Independent Decisions of Individual Parents Determine the Distribution of Benefits 16

TABLE OF CONTENTS
(continued)

Page

II. THE OHIO PILOT SCHOLARSHIP PROGRAM IS NEEDED TO OFFER VIABLE ALTERNATIVES TO ECONOMICALLY DISADVANTAGED STUDENTS, AND TO PROMOTE HEALTHY COMPETITION AMONG CLEVELAND-AREA SCHOOLS. 21

CONCLUSION 30

TABLE OF AUTHORITIES

Page(s)

CASES

Agostini v. Felton,
521 U.S. 203 (1997) ..... *passim*

Committee for Pub. Educ. & Religious Liberty v. Nyquist,
413 U.S. 756 (1973) ..... *passim*

County of Allegheny v. ACLU,
492 U.S. 573 (1989) 14

Good News v. Milford Cent. Sch.,
121 S. Ct. 2093 (2001) 15

Jackson v. Benson,
578 N.W.2d 602 (Wis. 1998) 15

Lynch v. Donnelly,
465 U.S. 668 (1984) 14

Mitchell v. Helms,
530 U.S. 793 (2000) ..... *passim*

Mueller v. Allen,
463 U.S. 388 (1983) ..... *passim*

Reed v. Rhodes,
1995 U.S. Dist. Lexis 3814 (N.D. Ohio Mar. 3, 1995) 21

Rosenberger v. Rector & Visitors of Univ. of Va.,
515 U.S. 819 (1995) 20

TABLE OF AUTHORITIES
(continued)

Page(s)

Simmons-Harris v. Zelman,
234 F.3d 945 (6th Cir. 2000).....*passim*

Witters v. Washington Dep't of Servs. for the Blind,
474 U.S. 481 (1986).....7, 16, 20

Zobrest v. Catalina Foothills Sch. Dist.,
509 U.S. 1 (1993).....*passim*

STATUTES

OHIO REV. CODE § 3313.976 .....8, 9, 19

OHIO REV. CODE § 3313.977 17

OHIO REV. CODE § 3313.978 .....*passim*

OHIO REV. CODE § 3313.979 17

OHIO REV. CODE § 3317.03 13

OHIO REV. CODE § 3317.08 13

OHIO REV. CODE § 3327.06 13

OTHER AUTHORITIES

Carol Innerst, *Competing to Win: How Florida's A+ Plan Has Triggered Public School Reform* (April 2000) (available at www.schoolchoiceinfo.org/research).....28

TABLE OF AUTHORITIES
(continued)

Page(s)

Cleveland City School District Performance Audit (Mar. 16, 1996) 21, 22

Cleveland Public Schools, *Getting the Job Done: A Blueprint to Improve Student Performance and Achieve Financial Stability* (Nov. 1995).....21

David Myers & William G. Howell, *An Evaluation of the New York City: School Choice Scholarships Program: The First Year*, Harvard Program on Education Policy and Governance Working Paper (1998) 25

Howard Fuller & George Mitchell, *The Impact of School Choice on Integration in Milwaukee Private Schools*, Marquette University, Current Education Issues, Number 2000-2, June 2000 (available at www.schoolchoiceinfo.org/research).....26

Jay P. Greene, *A Survey of Results from Voucher Experiments: Where We Are and What We Know* 4-5, CIVIC REPORT, No. 11 (July 2000) (available at www.schoolchoiceinfo.org/research).....*passim*

Jay P. Greene, *An Evaluation of the Florida A-Plus Accountability and School Choice Program*, Harvard Program on Education Policy and Governance (Feb. 2001) (available at www.schoolchoiceinfo.org/research).....28

TABLE OF AUTHORITIES
(continued)

Page(s)

Jay P. Greene, Paul E. Peterson & Jiangtao Du, *School Choice in Milwaukee: A Randomized Experiment*, LEARNING FROM SCHOOL CHOICE.....24

Jay P. Greene, *The Racial, Economic, and Religious Context of Parental Choice in Cleveland* (Nov. 5, 1999) (paper for the Annual Meeting of the Association for Policy Analysis and Management in Washington, D.C.) (available at www.schoolchoiceinfo.org/research).....14, 15, 22

John F. Witte, *The Milwaukee Voucher Experiment*, 20 EDUC. EVALUATION & POL'Y ANALYSIS 237 (1999).....25

Kim K. Metcalf, *Evaluation of the Cleveland Scholarship and Tutoring Program, 1996-99*, at 15 (Sept. 1999), Indiana University (available at www.schoolchoiceinfo.org/research).....23

Patrick J. Wolf, William G. Howell & Paul E. Peterson, *School Choice in Washington, D.C.: An Evaluation After One Year*, Harvard Program on Education Policy and Governance Working Paper (2000).....24

Paul E. Peterson & David E. Campbell, *An Evaluation of the Children's Scholarship Fund* (May 2001) (available at www.schoolchoiceinfo.org/research).....25, 26, 27

TABLE OF AUTHORITIES
(continued)

Page(s)

Paul E. Peterson, David Myers & William G. Howell, *An Evaluation of the Horizon Scholarship Program in the Edgewood Independent School District, San Antonio, Texas: The First Year*, Harvard Program on Education Policy and Governance Working Paper (1999) 25

Paul E. Peterson, David Myers & William G. Howell, *An Evaluation of the New York City: School Choice Scholarships Program: The First Year*, Harvard Program on Education Policy and Governance Working Paper (1998) 24, 25

Paul E. Peterson, Jay P. Greene, William G. Howell & William McCready, *Initial Findings from an Evaluation of School Choice Programs in Washington, D.C., and Dayton, Ohio*, Harvard Program on Education Policy and Governance Working Paper (1998) 25

Paul E. Peterson, William G. Howell & Jay P. Greene, *An Evaluation of the Cleveland Voucher Program After Two Years*, Harvard Program on Education Policy and Governance (June 1999) (available at www.schoolchoiceinfo.org/research) 22, 24

Paul E. Peterson, William G. Howell & Jay P. Greene, *An Evaluation of the Cleveland Voucher Program After Two Years*, Harvard Program on Education Policy and Governance Working Paper (1998) 23

TABLE OF AUTHORITIES
(continued)

Page(s)

Proficiency Still Elusive: Test Results in Most Classrooms Are Simply Dismal, and Any Reform Must Aim at Reversing That Trend, CLEVELAND PLAIN DEALER, Jul. 4, 1996, at 10B 21

State of Ohio 1999 District School Report Card for Cleveland City School District/Cuyahoga County.....28

State of Ohio 2000 District School Report Card for Cleveland City School District/Cuyahoga County.....29

State of Ohio 2001 District School Report Card for Cleveland City School District/Cuyahoga County.....29

William G. Howell & Paul E. Peterson, *School Choice in Dayton, OH: An Evaluation After One* Year, Harvard Program on Education Policy and Governance Working Paper (2000) 24

CONSTITUTIONAL PROVISIONS

U.S. CONST. amend. I, cl. 1.....*passim*

IN THE

Supreme Court of the United States

Nos. 00-1751, 00-1777 & 00-1779

SUSAN TAVE ZELMAN,
SUPT. OF PUB. INSTR. OF OHIO, ET AL.,
Petitioners,

v.

DORIS SIMMONS-HARRIS, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF BLACK ALLIANCE FOR EDUCATIONAL OPTIONS AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

This brief is filed on behalf of the Black Alliance for Educational Options as *amicus curiae* in support of petitioners, with the written consent of the parties.[1]

[1] Pursuant to Supreme Court Rule 37.6, *amicus* states that no counsel for a party authored this brief in whole or in part, and no person or entity other than the Black Alliance for Educational Options, its members, or its counsel has made a monetary contribution to the preparation or submission of this brief. Letters of consent are filed with this brief.

INTEREST OF AMICUS

The Black Alliance for Educational Options ("BAEO") is a non-profit, intergenerational organization of educators, parents, students, community activists, public officials, religious leaders, and business people. BAEO is committed to improving the educational opportunities available to minority and low-income children throughout the United States. Low-income parents – principally blacks and Hispanics – have less access than middle- and upper-income parents to high-quality teachers and schools. Low-income parents are also less satisfied than middle- and upper-income parents with the schools that are available to their children. This lack of access to educational opportunities contributes to the widening gap between poor black children and whites on virtually all indicators of academic achievement. BAEO believes that the American ideal of equal opportunity is unattainable for economically disadvantaged black children so long as they continue to lag far behind national averages.

BAEO's mission is to support parental choice as a means of empowering families and increasing educational options for black and other children living in depressed neighborhoods. For example, BAEO works to inform the general public about parental-choice initiatives; to educate black families about the various educational options available to them; to create, promote, and support efforts to enable black parents to exercise choice; and to heighten public awareness of efforts to reduce or limit educational options. BAEO partners with other minority group organizations to expand educational options and empower low-income parents, enabling those parents to choose the learning environments that are best for their children.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case is not about religion, but about educational policy and, ultimately, politics. Prior to the Ohio legislature's creation of publicly funded school choice programs, the

Cleveland City School District ("CCSD") enjoyed a monopoly over the educational opportunities available to inner-city Cleveland children. The families remaining in the district were in effect a captive audience; they could not afford to exercise choice by moving to better neighborhoods or sending their children to private schools. As a result, the public schools had little incentive to make improvements, notwithstanding the fact that the public system failed year after year to attain even the most minimal academic standards. Like almost any monopoly, the CCSD became complacent. Like any monopoly, the district is understandably threatened by the introduction of competitive alternatives – such as those offered by the Pilot Project Scholarship Program ("the Pilot Program") at issue in this litigation – that would unsettle the status quo. The educational market in Cleveland has not behaved much differently than one would expect any other market for services to operate. The primary difference is that the educational opportunities at stake are infinitely more precious and critical if children in depressed neighborhoods are ever to escape a culture of poverty and defeated expectations.

Having lost their political battle in the Ohio legislature, respondent opponents of parental choice have turned to the courts. In the State Supreme Court, they succeeded in overturning the first version of the Pilot Program on a legislative technicality but were rebuffed on their Establishment Clause claim. After the Pilot Program was re-enacted free of the technical flaw, respondents tried again in the federal courts. This time, they succeeded. The Sixth Circuit held that Ohio's facially neutral school voucher program amounts to an "establishment" of religion despite the fact that the program's benefits are made available on a nondiscriminatory basis to a broad range of individuals and schools without regard to religious beliefs or affiliation. The program allows the participation of public and private, sectarian and nonsectarian schools, and its benefits are distributed through the vehicle of individual, private choice, exercised without influ-

ence from the State. Parents of economically disadvantaged children may apply the voucher to any participating school program, regardless of whether that school is religious or not, and regardless of the family's own religious affiliation or lack thereof.

The Sixth Circuit worked backward from the fact that to date no suburban public schools have registered for the program and only 10 (out of 56) private schools that have registered were secular. Essentially disregarding this Court's clear position that a disproportionate effect alone does not violate the Establishment Clause, the court of appeals hypothesized that the low number of secular schools participating in the program was due to the program's leveling of a financial "disincentive" blocking their participation. That speculation is unfounded and is wrong. There is no evidence to support the court of appeals' supposition as to why more private secular schools have thus far not registered for the program. One reason may be that some private schools are disinclined to admit students from disadvantaged backgrounds (and the Ohio program requires participating schools to take all eligible students for whom there is room). Another factor may be the State's attractive "community school" option which is open to private secular schools (but not private sectarian schools) and offers greater financial inducements than the voucher program. As for suburban public schools, the Sixth Circuit's conjecture is contradicted by the record, which establishes that those schools are offered not only the $2,500 voucher but also $4,294 in per pupil aid for which private schools are not eligible. Ironically, it is quite plausible that the reason suburban public schools have not participated really comes back to politics: those schools may either politically oppose vouchers on principle, or fear bringing inner-city children from disadvantaged backgrounds into their midst. Regardless of the true reason, there certainly is no financial hurdle imposed on private sectarian or suburban public schools that is not also faced by the schools

that have registered for the program, and the lower court's unfounded speculation cannot serve to support its ruling.

If the Sixth Circuit's decision is allowed to stand, numerous parental-choice programs across the country will be in legal jeopardy, casting a pall nationwide on the development of innovative approaches to the seemingly intractable problem of failing urban public schools. As a result, thousands of economically disadvantaged children in Cleveland and other cities will be forced to return to systems that should be considered unacceptable by any civilized standard. The inner-city public schools from which parental-choice beneficiaries have escaped (and others hope to escape) suffer from grossly substandard proficiency test scores, low attendance and graduation rates, and high dropout rates. Those schools are also plagued by violence and disciplinary problems. If forced to return to this failing system, students who are currently attending schools of choice would be at risk of losing the strides they have made in the program, including higher test scores and higher levels of parent satisfaction and confidence in their schools. Perhaps even more importantly, the CCSD and school districts like it would lose a critical incentive for self-improvement: competition. The proven experience of many school districts shows that the prospect of losing students to alternative programs such as the Pilot Program spurs public schools to improve in order to retain students. The net result is that both groups of students (those opting for parental-choice alternatives and those remaining in the public system) win: improvements in proficiency test scores and other measures of academic and cultural quality have been documented both among the students who use vouchers and among the peers they leave behind at the public schools.

Fortunately, there is no reason for this Court to invalidate the Pilot Program. The Sixth Circuit's holding that the program is an establishment of religion is based on speculation,

misunderstanding of the facts, and misapprehension of this Court's recent Establishment Clause precedents. Because it is clear from the record that this facially neutral, private-choice-driven program makes its benefits available without reference to religion and does not create any special financial disincentive for nonsectarian schools to participate, the program does not have the primary effect of advancing religion. That the Pilot Program operates in a context that includes a diverse mix of public, secular schools of choice such as community (charter) and magnet schools only confirms the conclusion that Cleveland families who have chosen private, religious schools through the voucher program have done so as a result of genuine, independent private choice without the slightest influence from the State. Thus, the decision of the Sixth Circuit should be reversed.

ARGUMENT

I. THE OHIO PILOT SCHOLARSHIP PROGRAM DOES NOT HAVE THE PRIMARY EFFECT OF ADVANCING RELIGION UNDER THIS COURT'S CURRENT UNDERSTANDING OF THE EFFECTS TEST.

The central issue in this case is "whether the voucher program has the forbidden 'primary effect' of advancing religion." *Simmons-Harris v. Zelman*, 234 F.3d 945, 968 (6th Cir. 2000) (Ryan, J., concurring in part and dissenting in part).[2] The primary effect of the Pilot Program turns on two factors:

(1) whether the program is neutral and "defines its recipients" without "reference to religion," and

---

[2] Respondent agrees that the Pilot Program has a secular purpose. *See Simmons-Harris*, 234 F.3d at 967 (Ryan, J., concurring in part and dissenting in part).

(2) whether the program avoids any religious indoctrination attributable to the government.

Mitchell v. Helms, 530 U.S. 793, 808 (2000) (plurality) (summarizing holding of *Agostini v. Felton*, 521 U.S. 203, 234 (1997)).[3]

Because the Pilot Program is a neutral, private-choice-driven program, it satisfies both factors and does not have the primary effect of advancing religion. *See, e.g., Witters v. Washington Dep't of Servs. for the Blind*, 474 U.S. 481, 491 (1986) (Powell, J., concurring) ("[S]tate programs that are wholly neutral in offering educational assistance to a class defined without reference to religion do not violate the [effects test] because any aid to religion results from the private choices of individual beneficiaries.") (citing *Mueller v. Allen*, 463 U.S. 388, 398-99 (1983)). The Pilot Program offers its benefits without reference to religion, and it distributes benefits through the genuinely independent, private choices of parents who knowingly select a religious or nonreligious school without the slightest influence from the State. The program's primary effect is not to advance religion, but to expand the range of educational options available to underprivileged children in the Cleveland area, and to enhance the capacity of parents to exercise genuinely free choice in guiding the educational decisions of their children.

---

[3] The Court has also "recast *Lemon*'s entanglement inquiry as . . . one criterion relevant to determining a statute's effect," *Mitchell*, 530 U.S. at 808, but in this case there is "no serious claim that the statute is constitutionally invalid solely because it fosters an 'excessive entanglement' between government and religion." *Simmons-Harris*, 234 F.3d at 967 (Ryan, J., concurring in part and dissenting in part).

A. The Pilot Program Determines Eligibility for Benefits in a Neutral, Evenhanded Fashion Without Regard to Either the Religious Affiliation of the Participating Schools or the Religious Identity of the Families Who Use the Vouchers.

The Pilot Program clearly satisfies this Court's neutrality test. The neutrality inquiry focuses on whether the program impermissibly "define[s] its recipients by reference to religion," *Agostini v. Felton*, 521 U.S. 203, 234 (1997), or whether instead "the aid is allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, and is *made available* to both religious and secular beneficiaries on a nondiscriminatory basis." *Id.* at 231 (emphasis added). A program "that neutrally provides state assistance to a broad spectrum of citizens is not readily subject to challenge under the Establishment Clause." *Mueller v. Allen*, 463 U.S. 388, 398-99 (1983).

Under the Cleveland Pilot Program, eligible beneficiaries plainly are not "define[d] . . . by reference to religion." The program is neutral along two important axes. First, it is neutral with regard to the religious or nonreligious character of the schools that are allowed to participate. The program extends eligibility to private schools regardless of their sectarian or nonsectarian affiliation,[4] and it also extends eligibility to suburban public schools.[5] Second, the program is neutral with regard to the religious or nonreligious prefer-

---

[4] The program allows the participation of any private school – whether religious or nonreligious – that is located within the boundaries of the Cleveland school district and that satisfies the State's minimum secular educational standards. *See* OHIO REV. CODE § 3313.976(A)(1), (3).

[5] Public school districts adjacent to the Pilot Program district are eligible to participate in the program and "receive scholarship payments on behalf of parents." OHIO REV. CODE § 3313.976(C).

ence of the family that uses the voucher. The children's parents may apply the $2,500 vouchers at any participating private or suburban public school, religious or nonreligious. The program defines scholarship recipients not by reference to religion, but rather by reference to two nonreligious criteria: (1) the child must attend one of Cleveland's public schools; and (2) priority is given to children whose family income does not exceed 200 percent of the federally established poverty level. *See* OHIO REV. CODE § 3313.978(A). The statute explicitly forbids any of the participating schools, including religious ones, from applying a religious test or preference for admission. *See* OHIO REV. CODE § 3313.976(A)(4). As a result, students are free to attend schools outside their own religious affiliation, and evidence suggests that numerous students have done so.[6]

Notwithstanding the acknowledged facial neutrality of the statute, the Sixth Circuit held that the statute was not neutral. The court of appeals relied almost exclusively on this Court's 1973 decision in *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973), which invalidated a New York program providing tuition reimbursement *only* to parents whose children were enrolled in *private* schools. Although the statute was facially neutral with regard to religious and nonreligious private schools, the vast majority of the private schools were in fact religious, and the statute did not extend benefit eligibility to any family whose children attended public schools. In light of these facts, the *Nyquist* Court determined that "the effect of the aid is unmistakably to provide desired financial support for nonpublic,

---

[6] The religious diversity of the students participating in the program is impressive: "Forty percent were Baptist, 14 percent were other Protestants of various denominational affiliations, 25 percent were Catholic, 13 percent were affiliated with another religion, and 8 percent said they had no religious affiliation." Joint Appendix ("J.A.") 118a (Affidavit of Paul E. Peterson).

sectarian institutions." *Id.* at 783. According to the Sixth Circuit, *Nyquist* controls this case because here, as in *Nyquist*, "the great majority of schools benefited by these tuition dollars are sectarian." *Simmons-Harris*, 234 F.3d at 958. Under the Sixth Circuit's view, "[t]here is no neutral aid when that aid principally flows to religious institutions." *Id.* at 961.

The Sixth Circuit's reliance on *Nyquist* is misplaced. For one thing, in the years since *Nyquist*, this Court has explicitly and repeatedly rejected the idea that disproportionate effect alone justifies striking down a facially neutral statute. The focus when evaluating the neutrality of a statute is whether the statute's benefits are "*made available*" on a neutral basis, *Agostini*, 521 U.S. at 231 (emphasis added), not on how those benefits are ultimately distributed in any given year as between religious and nonreligious schools. In *Mueller*, for example, the fact that "96% of the children in private schools" attended religious schools, and that therefore "the bulk of deductions . . . will be claimed by parents of children in sectarian schools" was considered constitutionally irrelevant. 463 U.S. at 401. The Court explained that "[w]e would be loath to adopt a rule grounding the constitutionality of a facially neutral law on annual reports reciting the extent to which various classes of private citizens claimed benefits under the law." *Id.*; *see also Agostini*, 521 U.S. at 229 ("Nor are we willing to conclude that the constitutionality of an aid program depends on the number of sectarian school students who happen to receive the otherwise neutral aid."); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 9 (1993) (noting that program in *Mueller* was constitutional "even though the vast majority of those deductions (perhaps over 90%) went to parents whose children attended sectarian schools"). Thus, the mere fact that "the great majority of schools benefited by these tuition dollars are sectarian," *Simmons-Harris*,

234 F.3d at 958, does not render the program unconstitutional.[7]

Moreover, the Sixth Circuit ignores the critical factual distinction between *Nyquist* and this case. In *Nyquist*, an important factor in invalidating the private school tuition reimbursements was the fact that, on the face of the statute, those reimbursements were *made available* exclusively to parents of children in private schools.[8] The *Nyquist* Court left open the question whether "public assistance (*e.g.*, scholarships) *made available generally* without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited" would be valid. *Nyquist*, 413 U.S. at 782 n.38 (emphasis added).

That open question was answered in *Mueller*, where the Court upheld a statutory scheme allowing parents to take a tax deduction for the costs of tuition, books, and transportation. The Court distinguished *Nyquist* on the ground that the *Mueller* tax deduction on its face applied to "*all* parents, including those whose children attend public schools and those whose children attend nonsectarian private schools or sectar-

---

[7] One of the reasons that this Court has accorded little weight to the proportion of religious and nonreligious entities that benefit under any given statute is that those proportions are not static. For example, the Milwaukee parental choice program, which originally had a very high proportion of religious schools participating, recently "has seen dynamic growth in the number of nonsectarian schools participating in the program. The increase in the number of nonsectarian schools has been accompanied by a substantial growth in the number of students enrolled in nonsectarian schools: from 337 in 1990-91, to 786 in 1994-95, to 1,320 in 1995-96, to 2,215 in 1998-99, to 3,025 (of a total of 8,066) in this school year." J.A. 236a (Decl. of Howard Fuller ¶ 21). Howard Fuller is the Chair of the Board of *amicus* BAEO.

[8] *See Mueller*, 463 U.S. at 398 (fact that "public assistance amounting to tuition grants, was provided only to parents of children in *nonpublic* schools" "had *considerable* bearing on our decision striking down the New York statute at issue" in *Nyquist*) (emphasis added).

ian private schools." 463 U.S. at 397 (emphasis in original); *see also Zobrest*, 509 U.S. at 10 (aid made available "without regard to the sectarian-nonsectarian, or public-nonpublic nature of the school the child attends" is valid under the Establishment Clause) (internal quotation marks omitted).

The Pilot Program similarly implicates the very question left open by *Nyquist* and subsequently answered by this Court in *Mueller* and *Zobrest*. Similar to the program approved in *Mueller*, and unlike the program invalidated in *Nyquist*, the Cleveland program makes voucher funds available on a nondiscriminatory basis not only to secular and religious private schools, but also to suburban public schools.[9] Because the Pilot Program is neutral on both scores (religious-nonreligious and public-private), it is valid despite the fact that many of its benefits thus far have flowed through the independent decisions of parents to religious schools.

The Sixth Circuit evaded the clear import of *Mueller* only by finding that the Pilot Program's neutrality vis-à-vis public and private schools was "illusory." *Simmons-Harris*, 234 F.3d at 959. The court of appeals reasoned that the program creates an impermissible financial "disincentive" for secular schools – both public and private – to participate. That finding is built entirely on speculation and is contradicted by evidence in the record.

The Sixth Circuit first conjectured that the reason no suburban public schools had registered was that, "[a]t a maximum of $2,250, there is a financial disincentive for public schools outside the district to take on students via the school voucher program." *Id.* at 959. Contrary to the court of appeals' mistaken surmise, however, the Pilot Program

---

[9] Tutorial grants equal to the number of voucher-based scholarships are also made available for students who opt to remain in the Cleveland public schools. *See* OHIO REV. CODE § 3313.978(B). Grants are capped at $500 per student. *See id.* § 3313.978(C)(3).

enables public suburban schools to participate on terms that are considerably more favorable than the terms extended to private schools. Unlike private schools, the suburban public schools are eligible for the State's full per pupil allowance of approximately $4,294 per student in addition to the $2,500 voucher. *See* OHIO REV. CODE §§ 3317.03(I)(1), 3327.06, 3317.08(A)(1). If anything, the program favors suburban public schools; there certainly is no financial disincentive.[10] The record is silent as to why suburban public schools have chosen not to participate. Perhaps they oppose parental choice on principle. Perhaps they are reluctant to invite inner-city children from disadvantaged homes into their communities. Whatever their motive, they face no exclusion (as was present in *Nyquist*) or other structural barrier to their participation.

In similar fashion, the lower court also hypothesized that the disparity thus far in the number of religious versus nonreligious private schools that have registered for the Pilot Program resulted because "the tuition restrictions mandated by the statute limit the ability of nonsectarian schools to participate in the program, as religious schools often have lower overhead costs, supplemental income from private donations, and consequently lower tuition needs." *Simmons-Harris*, 234 F.3d at 959. The record, however, is devoid of evidence that nonreligious private schools face more financial difficulty under the program than do religious schools, or even that the proportion of religious schools among the 56 private schools that have registered for the program differs significantly from the proportion of religious schools among all private schools in Cleveland generally.

---

[10] A contrary finding may not be based on speculation alone. *Cf. Agostini*, 521 U.S. at 229 (rejecting speculation as basis for invalidating aid program under Establishment Clause).

The reality is that the State in fact has provided *stronger* incentives for secular private schools to participate in Cleveland's choice programs because only secular schools are eligible to participate in the "community school" program, which pays substantially greater tuition ($4,518 per pupil).[11] By viewing the State's voucher-based program in isolation – removed from the host of parental-choice options available, including community schools – the Sixth Circuit was able to treat private secular school participation in the community-school option as a strike against the voucher-based option. *See Simmons-Harris*, 234 F.3d at 959.

But surely an overall program that gives secular schools *greater* benefits than religious schools cannot be construed as advancing or endorsing religion. The court of appeals' error demonstrates the distortions that may result when the Establishment Clause analysis is improperly decontextualized.[12] When properly viewed in context, the Pilot Program

---

[11] Several nonsectarian private schools have in fact departed from the voucher program in order to join the community school program, thus leaving a higher proportion of religious schools in the voucher-based program. *See* Jay P. Greene, *The Racial, Economic, and Religious Context of Parental Choice in Cleveland* 4 (Nov. 5, 1999) (paper for the Annual Meeting of the Association for Policy Analysis and Management in Washington, D.C., available at www.schoolchoiceinfo.org/research [hereinafter *Context of Parental Choice*]) ("The Hope schools, which have now been re-established as community schools, educated nearly 15% of all scholarship students in past years.").

[12] This Court often has emphasized the importance of evaluating a challenged state action in light of its overall context. *See, e.g., Lynch v. Donnelly*, 465 U.S. 668, 680 (1984) ("Focus exclusively on the religious component of any activity would inevitably lead to its invalidation under the Establishment Clause."); *County of Allegheny v. ACLU*, 492 U.S. 573, 613 (1989) (invalidating creche placed alone on steps of City Hall as endorsement of religion, but upholding menorah standing next to a Christmas tree and sign saluting liberty because the "necessary result of placing a menorah next to a Christmas tree is to create an 'overall holiday setting'" that does not advance any particular religion). Indeed, the "reasonable observer" test for impermissible endorsement, which relies on

is just one element of a varied menu of parental educational choices by which the State has provided special funding for a number of alternative, nonreligious schools such as community schools and magnet schools, in addition to the voucher program. Only 16.5 percent of students now attending Cleveland schools of choice are attending religious schools. *See* Greene, *Context of Parental Choice*, *supra* note 11, at 105. Such an outcome can hardly be viewed as evidence of a program that is designed to advance or endorse religion. *Cf. Jackson v. Benson*, 578 N.W.2d 602, 614 n.9 (Wis. 1998) (upholding school choice program that "merely adds religious schools to a range of pre-existing educational choices available to [Milwaukee] children").

In sum, the Pilot Program clearly passes this Court's "neutrality" test. Far from creating a financial disincentive for secular schools to participate, the statute enables those schools to join the Cleveland choice programs on far more favorable terms than religious schools. The Pilot Program therefore falls within the category of "public assistance (*e.g.*, scholarships) made available generally without regard to the sectarian-nonsectarian or public-nonpublic nature of the institution benefited" that was contemplated in *Nyquist*, *see* 413 U.S. at 782 n.38, and ultimately approved in *Mueller*. The mere fact that the benefits for one component of Ohio's multifaceted parental-choice programs – vouchers – have thus far been distributed primarily to families whose children attend religious schools hardly suffices to invalidate the statute.

---

the same factors as the advancement inquiry, *see Agostini*, 521 U.S. at 235, is explicitly contextual. *See, e.g.*, *Good News v. Milford Cent. Sch.*, 121 S. Ct. 2093, 2106 (2001) ("[T]he reasonable observer in the endorsement inquiry must be deemed aware of the history and context of the community and forum in which the religious [speech takes place].") (internal quotation marks omitted).

B. The Pilot Program Does Not Result in Religious Indoctrination Attributable to the Government Because It Is a "Private Choice" Program in Which the Genuinely Independent Decisions of Individual Parents Determine the Distribution of Benefits.

The Pilot Program also passes the second important factor identified by this Court because the program does not result in any religious indoctrination that "could reasonably be attributed to governmental action." *Mitchell*, 530 U.S. at 809 (plurality) (citing *Agostini*, 521 U.S. at 226). This Court has held that benefits distributed, as these vouchers are, through the vehicle of genuinely independent private choices, are far less likely to violate the Establishment Clause than direct aid to religious institutions. The reason is that any advancement of religion occurring via the mechanism of private choice is not attributable to the State. *See, e.g.*, *Agostini*, 521 U.S. at 225-26.

Here, the Pilot Program clearly qualifies as a "private choice" program under the definition set forth in cases such as *Witters*, *Mueller*, and *Zobrest*.[13] As described, *supra*, par-

---

[13] In *Witters*, for example, this Court upheld a statute providing scholarships to any eligible disabled post-secondary student who spent the aid at an accredited educational institution, even a bible college. The Court found it "well settled that the Establishment Clause is not violated every time money previously in the possession of a State is conveyed to a religious institution." 474 U.S. at 486. Moreover, the *Witters* Court stated: "Any aid provided under Washington's program that ultimately flows to religious institutions does so only as a result of the genuinely independent and private choices of aid recipients." *Id.* at 488. Thus, the Court concluded, "it d[id] not seem appropriate to view any aid ultimately flowing [to the Christian college] as resulting from a *state* action sponsoring or subsidizing religion." *Id.*; *see also, e.g.*, *Mueller*, 463 U.S. at 399 (although "financial assistance provided to parents ultimately has an economic effect comparable to that of aid given directly to the schools attended by their children," the fact that the distribution of benefits resulted from "numerous private choices of individual parents" "reduced

ents may apply the scholarship at any participating school subject only to the availability of space in that school.[14] Schools are not permitted to discriminate against students on the basis of religion. Each scholarship is made "payable to the parents of the student entitled to the scholarship." *See* OHIO REV. CODE § 3313.979. The checks are sent to the school that the parents have selected, and the parents endorse the checks over to the school in order to pay tuition. *See Simmons-Harris*, 234 F.3d at 948. Thus, parents make an antecedent choice[15] and retain ultimate control over whether their children will attend a private school or remain in public school,[16] and if the former, over whether they will attend a secular or religious school. Scholarship funds reach a reli-

---

the Establishment Clause objections to which [the State's] action is subject"); *Zobrest*, 509 U.S. at 10 (interpreter's presence in a religious school was the "result of the private decision of individual parents," and "because the [statute] creates no financial incentive for parents to choose a sectarian school, an interpreter's presence there cannot be attributed to state decisionmaking").

[14] Once a student is selected for the program, the student's family applies to a participating private school of its own choice. *See* OHIO REV. CODE § 3313.978(A)(2)(a). If the number of applicants is greater than the available number of spaces at a particular school, the school gives priority to students enrolled during the prior year, siblings of students enrolled during the prior year, and students from low-income families, *see id.* § 3313.977(A)(1)(a)-(c), but any remaining spaces must be filled by lottery. *See id.* § 3313.977(A)(1)(d).

[15] The fact that parents have "the right and genuine opportunity . . . to choose not to give the aid," *Mitchell*, 530 U.S. at 902 (O'Connor, J., joined by Souter, J., concurring in the judgment), distinguishes this program from a more constitutionally suspect "per capita" aid program. *See id.*

[16] Parents who keep their children in public schools may seek tutorial assistance grants through the Pilot Program. *See* OHIO REV. CODE § 3313.978(B). They may also enroll their children in one of the many secular, public school alternatives available in Cleveland, including community (charter) and magnet schools.

gious school only because individual parents making private decisions selected that school from among numerous available options.

Yet, for the same reasons that the Sixth Circuit found the neutrality of the Pilot Program vis-à-vis secular schools to be "illusory," *id.* at 959, the court also opined that the "private choice" enabled by the statute could not be exercised in an authentic manner. In the court of appeals' view, "[t]he idea of parental choice as a determining factor which breaks a government-church nexus is inappropriate in the context of government limitation on the available choices to overwhelmingly sectarian private schools which can afford the tuition restrictions placed upon them and which have registered with the program." *Id.* at 960. The court concluded that "[t]he absence of any meaningful public school choice from the decision matrix yields a limited and restricted palette for parents which is solely caused by state legislative structuring." *Id.*; *see also id.* at 961 ("[N]or is there truly 'private choice' when the available choices resulting from the program design are predominantly religious.").

The Sixth Circuit's analysis is flawed in several respects. First, the court again erred by attributing to the State the suburban public schools' independent decision not to participate in the program. The court assumed that it was the program's design (*i.e.*, the size of the scholarship grants) that resulted in the fact that "no public schools from outside Cleveland have registered in the school voucher program, and there are no spaces available for children who wish to attend a suburban public school in place of a private school." 234 F.3d at 959. As discussed above, this factual premise of the court's claimed financial disincentive for public schools is nothing more than bald assertion, bereft of any record support.

Second, the record contains no evidence that the choices made by parents participating in the Pilot Program are influ-

enced by the proportion of religious schools participating in the program. None of the schools are permitted to impose religious or other restrictions on admissions, *see* OHIO REV. CODE § 3313.976(A)(4), so the parents' choices are not constrained in that sense. Moreover, there is no evidence that anyone who applied to any participating school was denied admission, or that any parent seeking a secular education for his or her child was not able to obtain a spot at one of the ten nonreligious private schools that presently participate in the program. Once again, the Sixth Circuit impermissibly substitutes speculation for facts not in the record. *See Mitchell*, 530 U.S. at 858 (O'Connor, J., joined by Breyer, J., concurring in the judgment) ("[I]t would be inappropriate to presume inculcation of religion; rather, plaintiffs raising an Establishment Clause challenge must present evidence that the government aid in question has resulted in religious indoctrination.").

Third, the majority's failure to evaluate the voucher program in context resulted in an inaccurate picture of the breadth of choice available to Cleveland parents. Whereas only 3,761 students received voucher grants during the 1999-2000 school year, an additional 16,184 Cleveland students were enrolled in magnet schools and another 2,087 were enrolled in community schools. *See* Greene, *Context of Parental Choice*, *supra* note 11, at 105 (available at www.schoolchoiceinfo.org/research). As a result, only 16.5 percent of Cleveland schoolchildren attending schools of choice were enrolled in religiously affiliated schools. *See id.* Viewed in the proper context, therefore, it is clear that parents have far more secular options than religious ones among Cleveland schools of choice.[17]

---

[17] Curiously, the court below again cited the relative attractiveness of the community school option as a reason why the voucher program should be invalidated, arguing that "state assistance is only available to those students who attend private schools," whereas "students may not

Finally, relying on its improper characterization of the Pilot Program as a "direct aid" program rather than a "private choice" program, the court of appeals applied the wrong legal standard in evaluating whether the statute resulted in impermissible governmental indoctrination. The Sixth Circuit held the Pilot Program invalid because it provides "no effective means of guaranteeing that the state aid derived from public funds will be used exclusively for secular, neutral, and nonideological purposes." *Simmons-Harris*, 234 F.3d at 958 (internal quotation marks omitted). But this Court plainly has "departed from the rule . . . that all government aid that directly assists the educational functions of religious schools is invalid." *Agostini*, 521 U.S. at 225. Such unrestricted assistance is permissible so long as the program is neutral and the assistance flows to the religious institution by virtue of independent private choices uninfluenced, as here, by the State. *See, e.g., id.* at 226; *Witters*, 474 U.S. at 487 (unrestricted funds to religious institution valid when those funds reached the institution under a neutral program and by virtue of "the genuinely independent and private choices of" individual recipients); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 842 (1995) (standard governing "direct money payments to sectarian institutions" does not apply where "no public funds flow *directly* to [the religious group's] coffers") (emphasis added). Thus, the court of appeals' concern about the unrestricted nature of the $2,500 voucher is inapposite.[18]

---

choose to attend community or magnet school using a voucher." *Simmons-Harris*, 234 F.3d at 959. Yet the fact that students may not use the voucher as such to attend a community school does not detract from the availability of the community school option among the range of educational alternatives available to Cleveland parents, of which the voucher program is but one.

[18] The voucher program arguably would be valid even if this were a "direct aid" program. *Cf. Mitchell*, 530 U.S. at 810 (plurality opinion) ("[I]f the government, seeking to further some legitimate secular purpose,

II. THE OHIO PILOT SCHOLARSHIP PROGRAM IS NEEDED TO OFFER VIABLE ALTERNATIVES TO ECONOMICALLY DISADVANTAGED STUDENTS, AND TO PROMOTE HEALTHY COMPETITION AMONG CLEVELAND-AREA SCHOOLS.

The Pilot Program invalidated by the Sixth Circuit in this case was adopted in the wake of an educational crisis so severe that the U.S. District Court for the Northern District of Ohio transferred control of the school district to the State of Ohio. *See Reed v. Rhodes*, 1995 U.S. Dist. Lexis 3814 (N.D. Ohio Mar. 3, 1995). The ongoing problems faced by the Cleveland City School District in the mid-1990s are by now all-too-familiar characteristics of our nation's inner-city educational systems. The difficulties ranged from extremely poor academic performance,[19] low graduation rates,[20] admin-

---

offers aid on the same terms, without regard to religion, to all who adequately further that purpose, then it is fair to say that any aid going to a religious recipient only has the effect of furthering that secular purpose.") (citation omitted).

[19] In a 1996 proficiency test of eighth-graders, "one of every three students statewide mastered all parts of the examination," whereas "fewer than one of every 10 in Cleveland did." *Proficiency Still Elusive: Test Results in Most Classrooms Are Simply Dismal, and Any Reform Must Aim at Reversing That Trend*, CLEVELAND PLAIN DEALER, Jul. 4, 1996, at 10B [hereinafter *Still Elusive*]. "In all, 13 of 21 [Cleveland] middle schools had overall passage rates of 5 percent or lower." *Id.* According to a 1996 audit of the Cleveland district, only 9 percent of the district's high school students passed all four sections of Ohio's ninth grade proficiency test. *See* Cleveland City School District Performance Audit (Mar. 16, 1996) [hereinafter 1996 Audit].

[20] "A study conducted by the Cleveland Public Schools demonstrates that only 26% of students who entered ninth grade in 1991 graduated on time and that only 7% of the students could pass the 12th grade proficiency examination upon graduation." J.A. 231a-232a (Decl. of Howard Fuller ¶ 10) (citing Cleveland Public Schools, *Getting the Job Done: A Blueprint to Improve Student Performance and Achieve Financial Stability* (Nov. 1995)). "Of those Cleveland students who managed

istrative problems,[21] and school violence. After taking control, the State acted quickly and creatively to remedy the situation by adopting a variety of innovative programs. Those initiatives included the Pilot Program.

The Pilot Program was designed to enable the most economically disadvantaged among the Cleveland students to opt out of the failing public system. First priority under the program goes to children whose family incomes are below or near the poverty line. *See* OHIO REV. CODE § 3313.978(A) (program must give preference to families with income below 200% of the poverty line). Sixty-eight percent of scholarship recipients are African-American, and 70 percent come from single-parent homes. *See* Paul E. Peterson, William G. Howell & Jay P. Greene, *An Evaluation of the Cleveland Voucher Program After Two Years*, Harvard Program on Education Policy and Governance (June 1999) (available at www.schoolchoiceinfo.org/research).

Economic disadvantage is typically accompanied in the United States by educational disadvantage, and Cleveland is no exception. Whereas wealthier families "choose" schools by moving to residential areas connected with high-quality schools or by enrolling their children in private schools,[22] the

---

to reach senior year, one of every four still failed to graduate." *Still Elusive*, *supra* note 19, at 10B.

[21] The State Auditor noted that the district was experiencing a "financial crisis that is perhaps unprecedented in the history of American education." 1996 Audit, *supra* note 19, at 1-1, 2-1.

[22] *See, e.g.*, Greene, *Context of Parental Choice*, *supra* note 11, at 12 n.13 ("According to the U.S. Department of Education 39% of students have exercised 'residential choice,' where access to desired schools influenced where the family lives."); J.A. 76a (Peterson Affidavit) ("Approximately 63 percent of American families with school-age children are making a choice when sending their child to school," including 39 percent who choose by residence, 11 percent who send their children to private school, and 13 percent who take advantage of alternative public school options such as magnet and charter schools).

urban poor have no such options. The vast majority of families with children in the Cleveland public schools cannot afford the housing costs in neighborhoods with better schools[23]; nor can they afford the tuition charged at private institutions. The poorest children remain in substandard schools while other families flee the district; the poor have no choice but to remain. And, unfortunately, a school system with a captive audience and no real competition has little incentive to make improvements. The Pilot Program was designed to alter that troubling dynamic by giving disadvantaged Cleveland youths some of the same options that more advantaged families already enjoy.

Preliminary evaluations of the Cleveland voucher program and of similar programs elsewhere suggest that choice programs are meeting their objectives. Choice programs have a substantial positive impact not only on the students and families who participate directly, but also on the public schools and the students who remain in the public system. The positive effects on voucher recipients themselves range from improved test scores,[24] enhanced parental satisfaction,[25]

---

[23] *See, e.g.*, J.A. 80a (Peterson Affidavit) (explaining that low-income families "often can afford a home or apartment only because it is located in a neighborhood where schools are perceived to be of low quality, a perception that depresses property values").

[24] Although empirical data on students in the Cleveland program are still preliminary, at least two studies have found significant academic benefits for parental-choice students. One found that "scholarship students in existing private schools had significantly higher test scores than public school students in language (45.0 versus 40.0) and science (40.0 versus 36.0). However, there were no statistically significant difference between these groups on any of the other scores." Kim K. Metcalf, *Evaluation of the Cleveland Scholarship and Tutoring Program, 1996-99*, at 15 (Sept. 1999), Indiana University (available at www.schoolchoiceinfo.org/research); *see also* J.A. 66a-72a (Affidavit of Kim Metcalf). Another report found that after two years Cleveland scholarship students at two of the choice schools had gained 7.5 national percentile rank (NPR) in reading and 15.6 NPR in math. *See* Paul E.

Peterson, William G. Howell & Jay P. Greene, *An Evaluation of the Cleveland Voucher Program After Two Years*, Harvard Program on Education Policy and Governance Working Paper (1998) [hereinafter *Cleveland After Two Years*] at table 12; *see also* Jay P. Greene, *A Survey of Results from Voucher Experiments: Where We Are and What We Know* 4-5, CIVIC REPORT, No. 11 (July 2000) (available at www.schoolchoiceinfo.org/research) [hereinafter *Survey of Results*] (discussing several studies concerning the Cleveland program).

Similar gains have been reported in the Milwaukee choice program and the privately funded school choice programs in Washington, D.C., Dayton, and New York. *See, e.g.*, Greene, *Survey of Results*, *supra* at 3 (finding gains of "11 normal curve equivalent (NCE) points in math and 6 NCE points in reading after three or four years of participation in the [Milwaukee] choice program") (citing Jay P. Greene, Paul E. Peterson & Jiangtao Du, *School Choice in Milwaukee: A Randomized Experiment*, LEARNING FROM SCHOOL CHOICE, at 345); *id.* at 5 (summarizing research showing that, "[a]fter one year of participation in the program, choice students in grades 2 through 5 in New York benefited by about 2 NPR in math and reading. Older students, in grades 4 and 5, gained four points in reading and six points in math") (citing Paul E. Peterson, David Myers & William G. Howell, *An Evaluation of the New York City: School Choice Scholarships Program: The First Year*, Harvard Program on Education Policy and Governance Working Paper (1998)); *id.* ("In D.C. African-American students in grades 2 through 5 gained 6.8 NPR in reading, but students in grades 6 through 8 lost 8.2 NPR in math.") (citing Patrick J. Wolf, William G. Howell & Paul E. Peterson, *School Choice in Washington, D.C.: An Evaluation After One Year*, Harvard Program on Education Policy and Governance Working Paper (2000), at table 17); *id.* ("In Dayton, African-American students gained 6.8 NPR in math but their gain in reading fell short of statistical significance, probably due to a modest sized sample.") (citing William G. Howell & Paul E. Peterson, *School Choice in Dayton, OH: An Evaluation After One* Year, Harvard Program on Education Policy and Governance Working Paper (2000), at table 17).

[25] One study of the Cleveland program found that "after two years of the program choice parents were significantly more satisfied with almost all aspects of their children's education than were the parents of a random sample of Cleveland public school parents. Nearly 50 percent of choice parents reported being very satisfied with the academic program, safety, discipline, and teaching of moral values in the private school," compared to only 30 percent of Cleveland public school parents who

decreasing incidence of disciplinary problems such as fighting and cheating,[26] and increasing racial and economic inte-

---

reported similar levels of satisfaction. *See* Greene, *Survey of Results*, *supra* note 24, at 2 (citing Paul E. Peterson, William G. Howell & Jay P. Greene, *Cleveland After Two Years*, *supra* note 24). Similarly dramatic improvements in parental satisfaction were also reported with the Milwaukee school choice program, *see* John F. Witte, *The Milwaukee Voucher Experiment*, 20 EDUC. EVALUATION & POL'Y ANALYSIS 237 (1999), and with privately funded school choice programs in Washington, D.C., Dayton, New York, and San Antonio. *See* Paul E. Peterson, Jay P. Greene, William G. Howell & William McCready, *Initial Findings from an Evaluation of School Choice Programs in Washington, D.C., and Dayton, Ohio*, Harvard Program on Education Policy and Governance Working Paper (1998); Paul E. Peterson, David Myers & William G. Howell, *An Evaluation of the New York City: School Choice Scholarships Program: The First Year*, Harvard Program on Education Policy and Governance Working Paper (1998); Paul E. Peterson, David Myers & William G. Howell, *An Evaluation of the Horizon Scholarship Program in the Edgewood Independent School District, San Antonio, Texas: The First Year*, Harvard Program on Education Policy and Governance Working Paper (1999).

Similar results are reported for the Children's Scholarship Fund (CSF), a privately funded, national scholarship fund that enables low-income families across the United States to send their children to a private school of their choosing: "After one-year of participation in the CSF programs in New York City, Washington, D.C., and Dayton, Ohio the average overall test score performance for African-American students who switched from public to private schools was 3.3 [NPR] higher than the performance of those who remained in public schools. After two years, their performance was 6.3 points higher. No gains or losses were found for students of other racial and/or ethnic groups." Paul E. Peterson & David E. Campbell, *An Evaluation of the Children's Scholarship Fund* (May 2001) (available at www.schoolchoiceinfo.org/research) [hereinafter *Children's Scholarship Fund*].

[26] The Children's Scholarship Fund research found that far fewer private school parents than public school parents rated the following problems as serious at their children's schools: fighting; cheating; stealing; gangs; racial conflict; and guns. *See* Peterson & Campbell, *Children's Scholarship Fund*, *supra* note 25, at 19.

gration.[27] Some evidence suggests that students who receive vouchers and attend a private school are more likely to hold the goal of obtaining a college degree,[28] and – if historical patterns in private schools continue – may be more likely to attain that goal.[29] Voucher programs may also encourage parents to become more involved in their children's educations, leading to better academic outcomes.[30]

It is especially noteworthy that the research conducted to date is uniformly positive or at least neutral regarding the

---

[27] *See, e.g.*, Greene, *Survey of Results*, *supra* note 24, at 10 (summarizing research results showing that "[t]he amount of integration is not great in either [the public or private school] system, but it is markedly better in the choice program"); *see also* Howard Fuller & George Mitchell, *The Impact of School Choice on Integration in Milwaukee Private Schools*, Marquette University, Current Education Issues, Number 2000-2, June 2000 (available at www.schoolchoiceinfo.org/research).

[28] *See, e.g.*, Peterson & Campbell, *Children's Scholarship Fund*, *supra* note 25, at 34 ("Forty-five percent of those attending private school anticipate finishing college and pursuing their educational studies further, while only 28 percent of public-school students have the same expectations.").

[29] *See* J.A. 109a (Peterson Affidavit) ("Even Professor John Witte, a voucher critic, agrees that studies of private schools 'indicate a substantial private school advantage in terms of completing high school and enrolling in college, both very important events in predicting future income and well-being. Moreover, . . . the effects were most pronounced for students with achievement test scores in the bottom half of the distribution.'").

[30] Research conducted in conjunction with the Milwaukee school choice program, for example, "shows that parents who exercise choice are more satisfied than public school parents and that they become more involved. For decades, educational research has linked parental involvement to improved academic outcomes. A study conducted by the Program on Education Policy and Governance shows significant gains in math and reading scores, gains that were they to continue could close the gap between minority and white achievement." J.A. 231a (Decl. of Howard Fuller ¶ 9).

effects of choice programs on participating students.[31] Effective, lasting change will undoubtedly take many years. As one commentator has pointed out, "[p]rivate schooling is not a magic bullet that transforms students over night. Elementary and secondary education is a long, painstaking process to which most people devote 13 years of their life." Peterson & Campbell, *Children's Scholarship Fund*, *supra* note 25, at 8. Even relatively small gains, if sustained year after year, would be sufficient to close much of the observed gap in proficiency test scores between the average black student and the average white student. *See id.* at 8-9.

The positive effects of choice programs on the public schools are also promising. Publicly funded voucher programs – including the Cleveland initiative – typically do not take money away from the public schools,[32] nor do they appear to siphon the best students.[33] Indeed, the Cleveland plan laudably requires participating schools to admit all eligible students for whom there is room. *See supra* note 14. Nevertheless, the existence of these alternative programs puts pressure on the public schools to improve their educational performance. Evidence shows that voucher programs, like other parental-choice programs, promote healthy compe-

---

[31] *See, e.g.*, Greene, *Survey of Results*, *supra* note 24, at 13 ("[P]erhaps the most striking finding from the review of school choice research is the absence of evidence about how school choice harms students or society.").

[32] "In Cleveland, . . . the state essentially held the public schools harmless against any financial losses they might suffer from losing students to the voucher program." Greene, *Survey of Results*, *supra* note 24, at 7. In Milwaukee, "the data indicated that there was no unfair financial impact on the public schools. Per pupil spending increased because students who left public schools took with them less than total per pupil funding." J.A. 233a-234a (Decl. of Howard Fuller ¶ 16).

[33] *See, e.g.*, Greene, *Survey of Results*, *supra* note 24, at 6-8 (concluding that voucher programs such as those in Cleveland and Milwaukee do not "cream" the best students from the public schools).

tition that spurs the public schools to become better at what they do. Harvard economist Caroline Hoxby has observed a salutary effect on public schools that have to compete with schools of choice. *See* J.A. 62a-64a (Affidavit of Caroline M. Hoxby). Anecdotal evidence in Milwaukee suggests that the public school district became more responsive to parental concerns after the voucher program was implemented.[34] And a study of the Florida A-Plus Accountability and School Choice Program indicated that even the mere prospect of vouchers program was enough to prod public schools into dramatically improved performance.[35] In short, competition from voucher programs makes the public schools work harder to raise performance and avoid public criticism. Parental-choice programs thus introduce a desirable element of competition encouraging public schools truly to earn their public funding.

Invalidating the Pilot Program, on the other hand, would force thousands of economically disadvantaged children to return to the substandard conditions of Cleveland's inner-city

---

[34] *See, e.g.*, J.A. 234a (Decl. of Howard Fuller ¶ 17) ("The positive reaction of the public and private schools in Milwaukee shows that parental choice helps improve all schools. During the last year, the Milwaukee Public Schools have: 1) sought to encourage parents of young children to attend MPS by promising in radio ads that the district will hire private tutors if students are not able to read at grade level by third grade; 2) permitted a dozen schools to hire teachers outside the seniority system that stymies reform; 3) responded to longstanding requests by parents for more new schools that specialize in popular programs as Montessori.").

[35] *See generally* Jay P. Greene, *An Evaluation of the Florida A-Plus Accountability and School Choice Program*, Harvard Program on Education Policy and Governance (Feb. 2001) (available at www.schoolchoiceinfo.org/research); *see also* Carol Innerst, *Competing to Win: How Florida's A+ Plan Has Triggered Public School Reform* (April 2000) (available at www.schoolchoiceinfo.org/research) (summarizing improvements in public schools triggered by the A+ program).

public schools.[36] Those children would be not only at risk of losing the gains they have made on tangible measures such as proficiency test scores, but also would be robbed of the only chance that many of them ever will have to exercise the same educational choices and freedoms that their wealthier counterparts take for granted. And the ramifications of invalidating the program would extend far beyond the boundaries of the Cleveland City School District. Similar programs nationwide also would face serious legal jeopardy: a chilling effect would descend on initiatives throughout the country that have been adopted in an effort to address the intractable problems associated with our nation's inner-city public schools. The loss of parental choice would concomitantly erode the incentives public schools need if they are to improve their educational offerings and their responsiveness to parental concerns.

Fortunately, no such jeopardy should occur as the Pilot Program's constitutionality is clear under this Court's precedents. Although many public schools undoubtedly would prefer to eliminate their newfound competition, they should not be permitted to do so through the vehicle of an Establishment Clause lawsuit. This neutral, private-choice-driven program – which has the purely secular purpose of helping to level the playing field for economically disadvantaged inner-

---

[36] Although the Cleveland schools have shown some improvement in the past two years, the district continues to lag behind on most indicators. In 1999, the State of Ohio reported that CCSD failed to meet even a single one of its 18 performance criteria for public schools. *See* State of Ohio 1999 District School Report Card for Cleveland City School District/Cuyahoga County. In 2000, CCSD also failed all 27 state performance standards. *See* State of Ohio 2000 District School Report Card for Cleveland City School District/Cuyahoga County. The graduation rate for CCSD students was 33 percent. *See id.* In 2001, CCSD managed to meet three of the 27 state standards, *see* State of Ohio 2001 District School Report Card for Cleveland City School District/Cuyahoga County, but even that progress would likely grind to a halt without the competition provided by alternative schools.

city youth and is free of any impermissible effect of endorsing religion – should be upheld.

CONCLUSION

For the foregoing reasons, the decision of the court of appeals should be reversed.

Respectfully submitted,

SAMUEL ESTREICHER
(*Counsel of Record*)
ERIKA R. FRICK
O'MELVENY & MYERS LLP
Citigroup Center
153 E. 53rd Street
New York, NY 10022
(212) 326-2000

Counsel for Amicus Curiae

November 9, 2001